



United States General Accounting Office
Washington, DC 20548

March 8, 2002

The Honorable Jim Gibbons
House of Representatives

Subject: Department of Energy: Contractor Litigation Costs

The Department of Energy (DOE) contracts with not-for-profit universities and private companies to operate its facilities. As part of the cost of operating these facilities, DOE can reimburse its contractors for the legal costs associated with cases brought against them. These cases involve such matters as equal employment opportunity, radiation and/or toxic exposure, personal injury, and wrongful discharge. In a letter dated May 26, 1998, you expressed concern that the federal government might be subsidizing contractors that violate the law. Specifically, you asked us to (1) determine what laws and regulations provide for DOE to reimburse its contractors for the litigation, settlement, and judgment costs in cases brought against them; and (2) provide information on such cases, particularly those involving equal employment opportunity, as to the number of cases and the costs that DOE reimbursed its contractors and that contractors paid themselves. On January 28, 2002, we briefed your staff on information related to the legal basis for DOE's reimbursement of contractor litigation costs and the number of, cost associated with, and disposition of contractor litigation cases. At that time, your staff requested that we transmit this information to you.

In summary, the Federal Acquisition Regulation—which governs acquisitions by all federal executive agencies—and DOE acquisition regulations—which supplement the Federal Acquisition Regulation—provide for the Department to reimburse its contractors for reasonable legal costs. (See encl. I.) Such costs are not reimbursable if there is liability related to the contractor's willful misconduct, lack of good faith, or failure to exercise prudent business judgment. In practice, DOE reimburses its contractors for most of the legal costs. From fiscal year 1995 through the third quarter of fiscal year 2001, there have been more than 2,100 cases involving various types of complaints against DOE contractors and the Department has reimbursed its contractors more than \$290 million for litigation and disposition (settlement and judgment) costs associated with these cases. (See encls. II through XI.) Conversely, the contractors have spent about \$13 million in their defense. In the same time period, there have been nearly 400 equal employment opportunity cases

Report Documentation Page

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| Abstract The Department of Energy (DOE) contracts with not-for-profit universities and private companies to operate its facilities. As part of the cost of operating these facilities, DOE can reimburse its contractors for the legal costs associated with cases brought against them. These cases involve such matters as equal employment opportunity, radiation and/or toxic exposure, personal injury, and wrongful discharge. In a letter dated May 26, 1998, you expressed concern that the federal government might be subsidizing contractors that violate the law. Specifically, you asked us to (1) determine what laws and regulations provide for DOE to reimburse its contractors for the litigation, settlement, and judgment costs in cases brought against them; and (2) provide information on such cases, particularly those involving equal employment opportunity, as to the number of cases and the costs that DOE reimbursed its contractors and that contractors paid themselves. On January 28, 2002, we briefed your staff on information related to the legal basis for DOE's reimbursement of contractor litigation costs and the number of, cost associated with, and disposition of contractor litigation cases. At that time, your staff requested that we transmit this information to you. | | |
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for which DOE reimbursed its contractors about \$53 million while the contractors spent about \$2 million.

The information presented in enclosures II through XI was developed from data we obtained from the DOE system used to track contractor litigation costs. We did not independently verify the accuracy of the data contained in this DOE system. We discussed the data presented in this report with the DOE official responsible for that system who attested to the data's accuracy. We performed our work from August 2001 through February 2002 in accordance with generally accepted government auditing standards.

As arranged with your office, unless you release its contents earlier, we plan no further distribution of this letter until 30 days after its issuance date. At that time, we will send copies to interested parties. This letter will also be available on GAO's home page at <http://www.gao.gov>. If you or your staff have any questions regarding this letter, please contact me at (202) 512-3841 or William Fenzel at (202) 512-3156.

Sincerely yours,

A handwritten signature in cursive script that reads "Gary L. Jones".

(Ms.) Gary L. Jones
Director, Natural Resources and
Environment

Enclosures - 11

Enclosure I

Legal Basis for DOE Paying Litigation, Settlement, and Judgment Costs for Cases against Its Contractors

Federal Acquisition Regulation (48 C.F.R. 31.205-47) and DOE regulations (48 C.F.R. 970.5228-1) provide for the reimbursement of reasonable legal costs.

DOE has issued guidelines on what legal costs are reasonable.

Legal costs include attorney fees and other litigation costs, and costs of settlements and judgments.

These costs are not reimbursable if there is liability caused by the contractor's willful misconduct, lack of good faith, or failure to exercise prudent business judgment. DOE has defined "prudent business judgment" as acting in the same manner as a prudent person in the conduct of a competitive business. "Willful misconduct" and "lack of good faith" are determined on a case-by-case basis by DOE.

Enclosure II

Number and Type of Contractor Cases (FY 1995 through third quarter of FY 2001)

| Type ^a | Number of cases closed | | | | | | | Ongoing | Total |
|----------------------------------|------------------------|------------|------------|------------|------------|------------|------------|------------|--------------|
| | FY 1995 | FY 1996 | FY 1997 | FY 1998 | FY 1999 | FY 2000 | FY 2001 | | |
| Equal employment opportunity | 34 | 67 | 56 | 58 | 62 | 44 | 20 | 40 | 381 |
| Radiation and/or toxic exposure | 4 | 3 | 1 | 1 | 3 | 0 | 28 | 11 | 51 |
| Personal injury ^b | 23 | 16 | 18 | 21 | 19 | 18 | 12 | 27 | 154 |
| Wrongful discharge | 9 | 16 | 18 | 10 | 8 | 10 | 8 | 7 | 86 |
| Whistle-blower | 8 | 17 | 16 | 17 | 16 | 23 | 12 | 20 | 129 |
| Worker compensation ^b | 12 | 65 | 72 | 100 | 87 | 100 | 46 | 186 | 668 |
| Other ^c | 56 | 59 | 92 | 79 | 94 | 70 | 44 | 153 | 647 |
| Total | 146 | 243 | 273 | 286 | 289 | 265 | 170 | 444 | 2,116 |

^aSome cases involved more than one legal issue but have been categorized according to the primary basis for the case as listed in DOE's contractor litigation tracking system.

^bWorker compensation involves an employee who has suffered an injury on the job whereas personal injury may or may not involve an employee who may or may not have suffered an injury on the job.

^cThis includes various types of cases such as breach of contract and Resource Conservation and Recovery Act cases.

Source: Developed by GAO based on DOE data.

Enclosure III

Disposition of Contractor Cases (FY 1995 through third quarter of FY 2001)

| FY closed | Number of cases | | | Total |
|-------------------|-----------------|--------------------|------------|--------------------------|
| | Dismissed | Settlement reached | Judgment | |
| 1995 | 59 | 74 | 13 | 146 |
| 1996 | 94 | 119 | 30 | 243 |
| 1997 | 104 | 151 | 18 | 273 |
| 1998 | 118 | 149 | 19 | 286 |
| 1999 ^a | 113 | 147 | 27 | 289 |
| 2000 ^a | 96 | 143 | 25 | 265 |
| 2001 | 77 | 85 | 8 | 170 |
| Total | 661 | 868 | 140 | 1,672^b |

^aFiscal year 1999 had two cases that were closed, but no final dispositions were identified. Fiscal year 2000 had one such case.

^bThis total does not include 444 cases that are still ongoing.

Source: Developed by GAO based on DOE data.

Enclosure IV

Disposition of Contractor Cases Involving Equal Employment Opportunity (FY 1995 through third quarter of FY 2001)

| FY closed | Number of cases | | | Total |
|-------------------|-----------------|--------------------|-----------|------------------------|
| | Dismissed | Settlement reached | Judgment | |
| 1995 | 14 | 17 | 3 | 34 |
| 1996 | 26 | 33 | 8 | 67 |
| 1997 | 28 | 21 | 7 | 56 |
| 1998 | 28 | 25 | 5 | 58 |
| 1999 | 29 | 27 | 6 | 62 |
| 2000 ^a | 15 | 22 | 6 | 44 |
| 2001 | 6 | 10 | 4 | 20 |
| Total | 146 | 155 | 39 | 341^b |

^aFiscal year 2000 had one case that was closed, but no final disposition was identified.

^bThis total does not include 40 cases that are still ongoing.

Source: Developed by GAO based on DOE data.

Enclosure V

Cost of Contractor Cases Reimbursed by DOE (FY 1995 through third quarter of FY 2001)

| | |
|-----------------------------------|----------------------|
| Litigation costs on open cases | \$105,877,877 |
| Litigation costs on closed cases | 66,673,583 |
| Disposition costs on closed cases | 119,398,592 |
| Total | \$291,950,052 |

Source: Developed by GAO based on DOE data.

Enclosure VI

Cost of Contractor Cases Paid for by the Contractor (FY 1995 through third quarter of FY 2001)

| | |
|-----------------------------------|---------------------|
| Litigation costs on open cases | \$1,855,807 |
| Litigation costs on closed cases | 9,359,142 |
| Disposition costs on closed cases | 1,738,509 |
| Total | \$12,953,458 |

Source: Developed by GAO based on DOE data.

Enclosure VII

Cost of Contractor Cases Involving Equal Employment Opportunity Reimbursed by DOE (FY 1995 through third quarter of FY 2001)

| | |
|-----------------------------------|---------------------|
| Litigation costs on open cases | \$24,206,953 |
| Litigation costs on closed cases | 18,761,018 |
| Disposition costs on closed cases | 10,098,475 |
| Total | \$53,066,446 |

Source: Developed by GAO based on DOE data.

Enclosure VIII

Cost of Contractor Cases Involving Equal Employment Opportunity Paid for by the Contractor (FY 1995 through third quarter of FY 2001)

| | |
|-----------------------------------|--------------------|
| Litigation costs on open cases | 0 |
| Litigation costs on closed cases | \$1,534,893 |
| Disposition costs on closed cases | 552,009 |
| Total | \$2,086,902 |

Source: Developed by GAO based on DOE data.

Enclosure IX

Examples of Large DOE Reimbursed Judgment Costs on Closed Contractor Cases^a

| Case | Category | DOE reimbursed litigation costs | DOE reimbursed judgment costs | Total DOE reimbursed costs |
|--|---------------------|---------------------------------|-------------------------------|----------------------------|
| HAMTC/JURISDICTIONAL v. BHI | Labor relations | \$97,698 | \$1,225,000 | \$1,322,698 |
| TRUMPP BROS v. SLAC | Bankruptcy | \$0 | \$462,204 | \$462,204 |
| GRANT-APOLLO v. ICF KH & FDNW | Contract – other | \$348,108 | \$402,343 | \$750,451 |
| BOTT v. ROCKWELL | Whistleblower | \$69,232 | \$309,077 | \$378,309 |
| COUSINS CONSTRUCTION v. MK- FERGUSON | Contract – other | \$19,703 | \$252,061 | \$271,764 |
| BRADLEY, W.T. v. WAUSAU INSURANCE COMPANIES | Worker compensation | \$0 | \$124,787 | \$124,787 |

^aThe costs shown are for fiscal year 1995 through the third quarter of fiscal year 2001. Some of the cases listed may also have had pre-fiscal year 1995 costs, which are not included in the totals above.

Source: Developed by GAO based on DOE data.

Enclosure X

Examples of Large DOE Reimbursed Settlement Costs on Closed Contractor Cases^a

| Case | Category | DOE reimbursed litigation costs | DOE reimbursed settlement costs | Total DOE reimbursed costs |
|--|--|---------------------------------|---------------------------------|----------------------------|
| DAY ET AL. v. NLO, INC., ET AL. | Tort – radiation and/or toxic exposure | \$1,971,871 | \$20,000,000 | \$21,971,871 |
| GREEN v. MK-F | Breach of contract | \$874,764 | \$13,379,869 | \$14,254,633 |
| MARTINEZ, GLORIA v. UC REGENTS, WILLIAMS AND MC CORKLE | Personal injury or liability/ wrongful death | \$415,861 | \$13,000,000 | \$13,415,861 |
| OCAW v. MMES (CONSOLIDATED) | Labor relations | \$161,594 | \$4,350,000 | \$4,511,594 |
| LMES (1) v. RUTH JOHNSON, COMMISSIONER | Tax | \$0 | \$3,632,737 | \$3,632,737 |
| OPTIMA CHEMICALS v. WSRC | Contract – other | \$43,930 | \$3,532,946 | \$3,576,876 |
| HATHAWAY v. SANDIA | Contract – other | \$52,593 | \$3,400,000 | \$3,452,593 |
| ANDERSON (SGT) v. WACKENHUT SERVICES | Fair Labor Standards Act | \$58,508 | \$3,024,398 | \$3,082,906 |

^aThe costs shown are for fiscal year 1995 through the third quarter of fiscal year 2001. Some of the cases listed may also have had pre-fiscal year 1995 costs, which are not included in the totals above except for DAY ET AL.

Source: Developed by GAO based on DOE data.

Enclosure XI

Examples of Large DOE Reimbursed Litigation Costs on Open Contractor Cases^a

| Case | Category | DOE reimbursed litigation costs | DOE reimbursed disposition costs | Total DOE reimbursed costs |
|---|---|---------------------------------|----------------------------------|----------------------------|
| COOK v. ROCKWELL & DOW | Class action | \$25,564,478 | \$0 | \$25,564,478 |
| DUPONT – HANFORD CLASS ACTION | Class action | \$19,217,728 | \$0 | \$19,217,728 |
| LOTT v. WSRC | Equal Employment Opportunity – Discrimination | \$17,085,157 | \$0 | \$17,085,157 |
| LMITCO v. LMAES AND LOCKHEED MARTIN CORPORATION | Contract – other | \$8,641,830 | \$0 | \$8,641,830 |
| SMITH & WRAY v. LMES, ET AL. | Tort – radiation and/or toxic exposure | \$4,843,262 | \$0 | \$4,843,262 |
| MEACHAM ET AL. v. KAPL ET AL. | Equal Employment Opportunity – Discrimination | \$2,800,205 | \$0 | \$2,800,205 |
| BOGGS, TERESA, ET AL. v. GOODYEAR, ET AL. | Tort – radiation and/or toxic exposure | \$1,894,961 | \$0 | \$1,894,961 |
| RAINER (1), ET AL. v. UCC, ET AL. | Tort – radiation and/or toxic exposure | \$1,771,320 | \$0 | \$1,771,320 |

^aThe costs shown are for fiscal year 1995 through the third quarter of fiscal year 2001. Some of the cases listed may also have had pre-fiscal year 1995 costs, which are not included in the totals above.

Source: Developed by GAO based on DOE data.